

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN FISH

Claimant

VS.

STEVE'S FRAMING

Respondent

AND

FARM BUREAU INSURANCE COMPANY

Insurance Carrier

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Docket No. 230,637

ORDER

Respondent requested Appeals Board review of Administrative Law Judge Julie A. N. Sample's April 22, 1999, preliminary hearing Order.

ISSUES

The Administrative Law Judge found claimant provided respondent with timely notice of his December 31, 1997, work-related low-back injury as required by K.S.A. 44-520. Claimant's preliminary hearing requests were for additional medical treatment and temporary total disability benefits for claimant's continuing symptoms of low-back pain.

The Administrative Law Judge ordered respondent to submit a list of three surgeons specializing in spinal injuries for claimant to select one to perform an independent medical examination of claimant to determine what, if any, medical treatment is necessary to relieve claimant from the effects of the back injury. Respondent was also ordered to pay claimant weekly temporary total disability benefits until claimant was found to have met maximum medical improvement.

Nether party filed a brief in this matter. But respondent's notice of appeal alleged the Administrative Law Judge exceeded her authority and jurisdiction in finding that claimant met with accidental injury arising out of and in the course of his employment. Further, respondent contends claimant failed to prove he provided respondent with timely notice of the accident as required K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record, the Appeals Board finds as follows:

This is the second preliminary hearing that has been held in this case. The first preliminary hearing, held on May 27, 1998, resulted in a preliminary hearing Order dated May 29, 1998. In that Order, the Administrative Law Judge ordered respondent to pay claimant weekly temporary total disability benefits and to provide claimant with medical treatment for a December 31, 1997, work-related back injury.

At the April 19, 1999, preliminary hearing, that is the subject of this appeal, the parties agreed that the previous preliminary hearing transcript and exhibits, admitted into evidence, would also be made a part of this preliminary hearing record.

Before the claimant testified at the April 19, 1999, preliminary hearing, the Administrative Law Judge announced the respondent had again raised the issue of timely notice that was previously decided in the May 29, 1998, Order. But the issue of whether claimant met with accidental injury arising out of in the course of his employment was not an issue before the Administrative Law Judge at the April 19, 1999, preliminary hearing.

The Appeals Board only has jurisdiction to review questions of law and fact that are raised before the Administrative Law Judge. See K.S.A. 1998 Supp. 44-555c(a). Accordingly, since the issue of whether claimant met with accidental injury arising out of and in the course of his employment was not raised before the Administrative Law Judge, the Appeals Board does not have jurisdiction to review that issue at this juncture of the proceeding.

At the May 27, 1998, preliminary hearing, both claimant and his employer, Steven Staley, d.b.a. Steve's Framing, testified in person before the Administrative Law Judge. On the issue of timely notice, the claimant testified that he notified his employer, Mr. Staley, that he injured his back at work on the date of the accident, December 31, 1997. Also, claimant testified he told Mr. Staley that he hurt back at work when Mr. Staley brought his pay check to his house on either January 2 or January 5, 1998. Additionally, claimant testified he told Mr. Staley that he hurt his back at work during a telephone conversation on January 7, 1998.

Conversely, Mr. Staley testified he did not have any knowledge that the claimant was making a claim for an injury at work until approximately two weeks after January 1, 1998. At that time, the general contractor contacted Mr. Staley and told him that the claimant had made a claim against the general contractor for a work-related accident.

In finding claimant provided respondent with timely notice of his accidental injury, the Administrative Law Judge had to believe the claimant when he testified he told his employer he hurt his back at work within 10 days of the accident as required by K.S.A. 44-520. Because the Administrative Law Judge had the unique opportunity to assess the

credibility of both witnesses, the Appeals Board finds some difference should be given to the Administrative Law Judge's findings and conclusions. Therefore, giving some difference to the Administrative Law Judge, the Appeals Board finds the claimant gave respondent timely notice of the accident. Thus, the Appeals Board concludes, the preliminary hearing Order should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Julie A. N. Sample's preliminary hearing Order dated April 22, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

c: David C. Byerley, Kansas City, MO
Jeffrey S. Austin, Kansas City, MO
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director